paralysed the company and reduced it to a state of complete helplessness and also exposed the company to penalties for non-compliance with the Companies Act 1965 and other laws of the country, e.g. income tax. Furthermore if the respondent who holds only 10% of the shares in the company considers himself an oppressed minority, his remedy would lie in his petitioning for dissolution of the company as an oppressed minority and not stultifying operations of the company and cause it irreparable damage. No Court of Law or Equity could condone such conduct let alone buttress it with the sanction of the court. Common sense would require that the company should be allowed to function and any aggrieved party should obtain redresses through the remedies recognised by law and open to him. The court therefore allowed the application in terms of the prayers in the originating summons.

Application allowed.

Solicitors: *Mathuram & Co.; Goh Lim Eam & Co.*

TAN LAI v. MOHAMED BIN MAHMUD & ORS.

[O.C.J. (Salleh Abas F.J.) August 26 & September 14, 1981]
[Kuala Trengganu — Civil Suit No. 106 of 1974]

Contract — Guarantee — Sawmill licence granted to first defendant and another — Licence not transferable — Incorporation of company to work sawmill license — Company originally virtually controlled by plaintiff — Shares in company subsequently sold to first defendant — Delayed payment — Guarantee given by defendants — Claim on guarantee — Whether contract illegal.

A sawmill licence had been granted to the first defendant and another to operate a sawmill. The license was not transferable. A company was formed to work the sawmill licence, with a $200,000.00 capital, of which 75% was held by the plaintiff and the remaining 25% by the first defendant and the other licensee. Subsequently the plaintiff sold his shares in the company to the first defendant. The plaintiff accepted delayed payment but obtained a guarantee from the other three defendants. Defendant No. (1) paid $12,000.00 towards the purchase price but refused to pay the outstanding balance of $43,000.00. The plaintiff sued the defendants for the amount due. The defendants claimed that the sale of the shares and the guarantee agreement were illegal.

Held: (1) the agreements pursuant to which the company was incorporated were illegal as the agreements amounted to an attempt to circumvent the condition of the licence as to its non-transferability to non-licensees;

(2) however the incorporation of the company was perfectly lawful and while its operation of the sawmill was illegal as it had no sawmill licence to cover the operation, the sale of the shares and the guarantee agreement for the purpose of making the company's operations come within the ambit of legality were not illegal;

(3) the plaintiff was therefore entitled to judgment for the balance of $43,000.00 due on the agreement.

Cases referred to:-

(1) *R.* v. *Registrar of Joint Stock Companies* [1931] 2 K.B. 197.

(2) *Bowmakers Ltd.* v. *Barnet Investments Ltd.* [1944] 2 All E.R. 579, 582.

(3) *Sajan Singh* v. *Sardara Ali* [1960] M.L.J. 52; [1960] 1 All E.R. 269.

(4) *Devanai* v. *Chinniah & Ors.*, Kuala Trengganu Civil Suit No. 41 of 1967 *(unreported)*.

CIVIL SUIT.

Gurbakhash Singh for the plaintiff.

S.E. Rajah for the defendant.

Cur. Adv. Vult.

Salleh Abas F.J.: In this case counsel for both parties agreed not to call oral evidence. They relied upon the facts as disclosed in the pleadings and the agreed bundle of documents, which are as follows.

Upon being told by the State Forest Officer that their application to erect a sawmill at Batu Rakit was approved, the defendant No. (1) and one Cik Chik bt. Haji Mohamed (not a party to this suit) signed two agreements with the plaintiff. The first agreement was signed on July 6, 1972, whilst the second one on December 13 of the same year. These two agreements, identical in terms, made provision for the incorporation of a company to be named as Perusahaan Kayu Rakit Sdn. Bhd. (in this judgment referred to as the company) "to work the said sawmill licence", with a $200,000 capital of which 75% was to be held by the plaintiff and the remaining 25% by the defendant No. (1) and Cik Chik. It was also agreed that the management and control of the company was to be the sole responsibility of the plaintiff. Accordingly the company was incorporated on November 18, 1972 and the licence to erect and operate a sawmill was issued to the defendant No. (1) and Cik Chik on June 7, 1973. The company has since been operating its sawmill presumably by relying upon this licence. Subsequently a dispute arose between the plaintiff and the defendant No. (1) and the dispute was finally settled by the plaintiff opting out of the company and selling all his shares to the defendant No. (1) for $55,000. As the defendant No. (1) was unable to make immediate payment for these shares, on May 24, 1974 he and the defendant No. (2), (3) and (4) and the plaintiff signed a guarantee agreement whereby in consideration of the plaintiff accepting delayed payment for the shares the other three defendants gave a guarantee for such payment. The defendant No. (1) has so far paid $12,000, and refused to pay the outstanding balance of $43,000. When sued for the recovery of this amount, all the four defendants claimed that the sale of shares to the defendant No. (1) and the guarantee agreement were illegal and that the plaintiff's suit should therefore be dismissed. The defendants also counterclaimed for the return of $12,000 previously paid to the plaintiff on the ground that the payment was made under a mistake of law.

At the start of the hearing before me counsel for both sides agreed to submit for my decision without calling any oral evidence an issue of law whether or not the guarantee agreement was illegal. If so, counsel agreed that the plaintiff's claim should be dismissed and if it is otherwise judgment for the plaintiff in the sum of $43,000 should be entered. The counterclaim of $12,000 was dropped. In my view this was rightly done because if the payment was made under an illegal contract as was contended by the defendants under no circumstances could they rely upon that same contract to recover the amount so paid. Hence the dropping of the counterclaim was properly done.

The sawmill licence in this case authorises

"the defendant No. (1) and Cik Chik to erect and/or operate a sawmill at Batu Rakit to be known as the Perusahaan Kayu Batu Rakit Sdn. Bhd. for the period or periods specified below subject to the following conditions...."

One of the conditions is condition No. (1) in that the licence shall not be transferable. In my judgment so

long as the company was owned and managed by the defendant No. (1) and Cik Chik, by lifting the veil of incorporation it could be held that they have erected and operated the sawmill and that the company's operation was within the terms of the licence. But where the company was virtually wholly owned by the plaintiff and completely managed by him, the defendant No. (1) and Cik Chik could not be held to have erected and operated the sawmill. Consequently the company could not be held to have operated within the terms of the licence as it was not authorised by it, nor did the licence permit its transferability to the company. Thus counsel for the defendants was correct when he submitted that the two agreements signed on July 6 and December 13, 1972, pursuant to which the company was incorporated were illegal as the agreements amounted to an attempt to circumvent the condition of the licence as to its non-transferability to non-licencees. But with respect I do not accept his submission that the incorporation of the company itself was illegal just because the agreements as to its formation were illegal.

It must be observed that the company is not the creature of these two agreements, although the parties thereto agreed that it should be incorporated. The existence of the company is the result of the statutory acts of the Registrar of the Companies under section 16 of the Companies Act in registering the company and its memorandum and articles and in issuing a certificate of its incorporation. The effect of these acts is that as from the date specified in the certificate the subscribers, i.e. the plaintiff and the defendant No. (1) together with Cik Chik became "a body corporate" by the name of Perusahaan Kayu Batu Rakit Sdn. Bhd. capable forthwith of exercising the functions of an incorporated company (*vide* section 16(5)). As to the evidence of its valid existence section 361 of the Companies Act provides that —

"A certificate of incorporation under the hand and seal of the Registrar shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the company referred to therein is duly incorporated under this Act."

This provision makes it impossible for anyone to challenge the lawfulness and validity of the existence of the company although it does not go so far as to say that the company's objects and powers contained in the memorandum are either lawful or lawfully exercisable. To put it in another way, a certificate of incorporation prevents any doubt from being cast upon the legal existence and the persona of the company but it does not validate its illegal objects. Of course a company pursuing an illegal object should not be registered and the Registrar is entitled to refuse the registration of such company and his refusal is reviewable upon an application on *mandamus*, (*R.* v. *Registrar of Joint Stock Companies*),[1] but once the company is registered the court has to accept and recognise its valid and lawful existence until it is wound up or until its registration is cancelled at the suit of the Attorney-General on account of its registration for an illegal object (see *Palmer's* Company Law: 21st Edition pp. 119-123).

Thus having regard to the provisions of sections 16 and 361 of the Companies Act, the view I take of this case is that the incorporation of Perusahaan Kayu Batu Rakit Sdn. Bhd. was completely lawful, although its operation of the sawmill, being an operation without a licence required by rule 20(1) of the Trengganu Forest Rules, 1356 is illegal and the company may well be liable to be punished by daily fines as provided in rule 20(4). The licence was not issued to the plaintiff nor could it be transferred to him, and as the plaintiff by virtue of his full control and shareholding, is in fact the alter ego of the company the operation of the sawmill when the company was thus constituted is illegal; the elements of illegality being the plaintiff's full control and management as well as shareholding in the company vis-a-vis the licence. But where the defendant No. (1) and Cik Chik themselves have the full control and ownership as effected by the plaintiff selling all his shares to the defendant No. (1) the company's operation comes exactly within the terms of the licence and is therefore not illegal. It is with a view to get rid of the elements of illegality that the plaintiff divested himself of the control and management of the company by selling all his shares in it to the defendant No. (1) and that in order to ensure that he would ultimately receive the price of these shares, the plaintiff and the defendant No. (1) together with three other defendants entered into the guarantee agreement on May 24, 1974. Thus the basis of the plaintiff's claim against the defendant No. (1) is the sale of his shares whilst his claim against the other three defendants is founded on the guarantee given in the said agreement. Counsel for the defendants submitted that the sale of shares and the guarantee were illegal because the incorporation of the company was illegal and so the plaintiff should not be able to recover any payment from any or all of those four defendants. With respect I do not think that the submission is correct in view of the fact that the incorporation of the company is an independently legal and valid act of the Registrar of Companies.

As regards the sale of shares I cannot see anything illegal in the transaction. There is nothing illegal about its capital structure and the plaintiff's shareholding as the company is validly incorporated and has a valid existence. The previous two agreements following which the company was formed were irrelevant and could not render the plaintiff's share ownership in the company illegal. That being the case, the subsequent sale of the shares by the plaintiff to the defendant No. (1) and the guarantee given by the other three defendants against failure of the defendant No. (1) to pay the price of these shares were also not illegal.

I draw support for my judgment from the principle established in *Bowmakers Ltd.* v. *Barnet Investments Ltd.*,[2] which principle was later accepted and applied by the Privy Council in *Sajan Singh* v. *Sardara Ali*.[3] The principle is that where the plaintiff's claim is wholly independent of the alleged illegal contracts, there is no question of applying the maxim *ex turpi causa non oritur actio*. Thus it was held that the plaintiff was entitled to claim his property which was being detained or converted by the defendant to his use, even though the property came into the latter's possession as a result of an illegal contract.

Further during the course of counsel's submissions in the present case before me, I was referred to the judgment of Datuk Mohamed Zahir J. in *Devanai* v. *Chinniah & Ors.*[4] Lest I might be misunderstood to have taken a different view from that of the learned judge, I should explain that case as follows. The plaintiff was the proprietress of a sawmill business named Kapur Sawmill. The sawmill licence for this business was issued in the name of the business. Later she sold the business to the defendant No. (1), who subsequently formed a partnership with the other two defendants and some other persons to run the sawmill business. Although the plaintiff had completely divested herself of this business, the defendant No. (1) had not yet fully paid the plaintiff the sale price of the business. Consequently the plaintiff sued for the rescission of the sale agreement and for a declaration that she was still the owner of the business. She also claimed the balance of the sale price of the business. The learned judge dismissed her claim for rescission and declaration, but allowed the claim for the balance of the sale price. The learned judge refused to allow claim for rescission and declaration, because in his judgment the sale agreement transferring the business from the plaintiff to the defendant No. (1) and the partnership agreement transferring it further from this defendant to the partnership were both illegal contracts. They were illegal because the transfers must necessarily include dealings with the requisite sawmill licence, and as the licence was not transferable such dealings were contrary to the provisions of rule 20 of the Trengganu Forest Rules, 1356. Hence the contracts were illegal. It is observed that despite the illegality of the sale agreement, the plaintiff was held to be entitled to the balance of the sale price of the business. The learned judge gave no reason for allowing the plaintiff to recover the balance of the sale price, but in my view her entitlement could be justified on the ground that the transfer of business to the defendant No. (1), even though under the illegal sale contract, was effective as this transfer did not depend upon, but was independent of, the transferability of sawmill licence. Hence the case came within the principle established in *Bowmakers Ltd.* v. *Barnett Investment Ltd., supra* and *Sajan Singh* v. *Sardara Ali, supra.*

Now reverting to the present case, I hold that although the previous two agreements were illegal, the incorporation of the company was a perfectly lawful exercise as the company was not the creature of these two agreements but created by the statutory acts of the Registrar of the Companies under section 16 of the Companies Act. Whilst its operation to run the sawmill was illegal as it had no sawmill licence to cover such operation, the sale of shares and the guarantee agreement for the purpose of making the company's operations come within the ambit of legality were not illegal. Hence there should be a judgment entered for the plaintiff in the sum of $43,000 and costs.

Claim allowed.

Solicitors: *Gurbakhash Singh & Co.; S.E. Rajah & Co.*

PUBLIC PROSECUTOR v. DATUK HAJI DZULKIFLI

[O.Cr.J. (Tan Chiaw Thong J.) September 14, 1981]
[Kota Kinabalu — Criminal Trial No. 2 of 1979]

Criminal Law and Procedure — Altered charge — Whether fresh consent of Public Prosecutor necessary — Prosecution by Deputy Public Prosecutor — Implied consent — Criminal Procedure Code, ss. 3 & 158 — Emergency (Essential Powers) Ordinance, 1970, s. 9.

Jurisdiction — Whether court could alter charge — Criminal Procedure Code, s. 158.

Learned counsel for the accused had submitted that, because the court at the end of the case for the prosecution altered the charge against the accused, a fresh consent of the Public Prosecutor was necessary before the accused was asked to plead to the altered charge.

The altered charge amended the original charge in 2 respects, namely:— (a) by substituting for the word "approval" the word "concurrence" in relation to the act alleged to have been done by the accused for his pecuniary advantage; and (b) by deleting items (8) and (9) of the particulars relating to the pecuniary advantage alleged against the accused.

The following points were made before the court:— (1) whether the court had jurisdiction to alter the charge against the accused; (2) whether a prosecution under an altered charge within Ordinance 22 of 1970 should be proceeded with is a matter within the jurisdiction of the Public Prosecutor to decide; and (3) the charge was not amended, but altered, in that the word "approval" was altered to the word "concurrence."

Held: (1) the consent is in respect of the prosecution of the accused for an offence of corrupt practice under section 2(1) of Ordinance 22 of 1970. The altered charge against the accused relates to the same offence and not a different one. The alterations made related to particularizations in the original charge only, and do not have the effect of charging the accused with a different offence. Hence, provided the court may properly alter the original charge in the manner it has done, the altered charge falls within the ambit of the consent of the Public Prosecutor;

(2) even if a fresh consent of the Public Prosecutor is necessary to prosecute the accused on the altered charge, the prosecution of the accused by a Deputy Public Prosecutor in this court from the outset constitutes such a consent. The second and third points raised by the learned counsel for the accused were therefore rejected;

(3) as regards the first point, the alteration to the original charge was made under section 158 which clearly empowers and authorizes the court to do. It is therefore within the jurisdiction of the court to do so;

(4) a fresh consent of the Public Prosecutor is therefore unnecessary before the accused is called upon to plead to the altered charge and to be further tried thereon.

Cases referred to:-

(1) *Abdul Hamid* v. *Public Prosecutor* [1956] M.L.J. 231.

(2) *Perumal* v. *Public Prosecutor* [1970] 2 M.L.J. 265, 266.

(3) *Haji Abdul Ghani & Anor.* v. *Public Prosecutor* [1981] 2 M.L.J. 230.

(4) *Public Prosecutor* v. *Lee Chwee Kiok* [1979] 1 M.L.J. 45.

CRIMINAL TRIAL.

Abdul Khalid bin Abdul Manaf (Deputy Public Prosecutor) for the Public Prosecutor.

Dominic Puthucheary (*Abdul Razak Rouse* with him) for the accused.

[**Editorial Note:** See also *Public Prosecutor* v. *Mohamed Halipah* [1982] 1 M.L.J. 155.]